IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2019 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

RAMNIKLAL D SHAH THORUGH HIS HEIRS SUSHILABEN R SHAH

Versus

STATE OF GUJ

Appearance:

1. Special Civil Application No. 2019 of 1988

MR MD RANA for Petitioner No. 1

MR LR PUJARI, AGP for Respondent No. 1,3

MR ASIM PANDYA for HL PATEL ADVOCATES for Respondent No. 2

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 07/08/2002

CAV JUDGEMENT

1. Late Ramniklal Dharshi Shah, the original petitioner had filed this petition under Article 226 of

the Constitution of India for claiming the retiral benefits, namely pension and gratuity in accordance with pay-scale prescribed by the Government for the category of Octroi Clerk, which according to him, were denied by the respondents.

2. According to the petitioner he was appointed by the respondent no. 2 as Junior Clerk on 9th December, 1965 by passing resolution. He joined the duty on 26th December, 1965. On 7th November, 1966 respondent no. 2 decided to put the petitioner in the pay-scale of Rs.40-2-50 and also granted allowances admissible to him under the extent rules. On 13th April, 1967 respondent no. 2 took decision to revert the petitioner as Octroi Guard and around 16th April, 1967 the petitioner assumed the charge of Octroi Guard. Having put in more than 20 years of service, he came to be retired vide order dated 8th October, 1986 on reaching the age of superannuation. It is his case that since he had put in more than 20 years' service, he had become entitled to receive pensionary benefits and gratuity and hence about six months prior to his actual retirement, he had requested the authorities to prepare the pension case, but unfortunately the authority did not take any action in that direction. He, therefore, submitted a representation to the Panchayat Department of the Government requesting that he may be granted his retiral benefits such as pension and gratuity, copy whereof was forwarded to the respondent no. 2. His representation was, however, turned down by the respondent, which was made known to him vide intimation dated 25th January, 1988. The reason given by the respondents to turn down the request was that the Panchayat had not framed any rule regarding payment of pension and gratuity and also that the financial condition of respondent no. 2 was very weak and it was unable to bear such financial burden. The petitioner ultimately made application to the Pension Cell constituted by respondent no. 1, but that also did not yield any result. According to the petitioner, he was entitled to receive these benefits by virtue of the fact that he had already rendered qualifying service of more than 20 years. Since this statutory benefit was not made available to him, despite several efforts to get them from the respondents, he was constrained to approach this Court by way of this petition.

2.1. According to the petitioner, he has been deprived of his legitimate right without any rime or reason and such refusal on the part of respondents amounts to an action violative of Articles 14 and 16 of the

Constitution of India.

2.2. During pendency of this petition original petitioner expired and in his place, his widow namely, the present petitioner Smt. Sushilaben R. Shah was permitted to be joined as petitioner in this petition vide order dated 17th June, 1991 passed on Civil Application No. 841 of 1991. The prayer in the petition also came to be amended in view of this development to the effect that she was entitled to receive the arrears of amount of pension from November 1986 till the death of her husband and thereafter the family pension and also the arrears on that count together with interest at the rate of 18%.

2.3. This petition has been resisted by the Government i.e. respondent no. 1 by filing affidavit-in-reply of one Mr. R.B. Patel, Under Secretary, Panchayats, Rural Housing and Rural development Department, Sachivalaya, Gandhinagar. According to respondent no. 1 petitioner is not entitled to receive pensionary benefits and gratuity as his appointment in the service of respondent no. 2 by way of resolution no.37 dated 8th December, 1965 as a Clerk/Guard was against the recruitment rules as provided in the Gujarat Panchayats Act, 1961 (for short 'the Act') as well as Panchayat Rules. It is stated that in view of Government circular dated 25th August, 1983 and as per the judgment of the Hon'ble Supreme Court reported in AIR 1984 S.C. p. 161 Gram/Nagar Panchayat has no power to recruit/appoint/promote/regularise any employee in Gram/Nagar Panchayat and even though Gram/Nagar Panchayat has made such recruitment/appointment/promotion/regularization will be considered as cancelled. In view of the circular and the judgment referred to in the affidavit the appointment of the petitioner was not regular one and he was, therefore, not entitled to receive pensionary benefits. It is further stated that on 24th April, 1988 respondent no. 2 has paid to petitioner Rs.10,744/- by way of gratuity and provident fund in view of the judgment and order dated 24th October, 1987 passed by this Court and hence he cannot now get the benefit of pension. It is lastly submitted that since petitioner was neither allocated employee nor Panchayat service employee as he was not appointed on the regular pay-scale on the establishment of respondent no. 2 and his services were not regularized by the D.D.O. with the consultation of Gujarat Panchayat Service Selection Board and, therefore, he was not eligible to receive pension. It has been lastly stated that as per the decisions of this Court

respondent no. 1 is not liable to pay the pension and gratuity to the petitioner.

3. Before I reproduce the rival contentions raised by the parties and deal with them, it may be stated that initially this petition came to be placed before the learned Single Judge of this Court [Coram : S.K. Keshote, J.], who vide CAV judgment dated 24/10/1997 disposed of the same by giving direction to respondents nos. 1 and 3 to comply with the directions given by the Hon'ble Supreme Court in the case of the R. K. Soni v/s. State of Gujarat (AIR 1984 S.C. 161) and to consider the case of the petitioner for grant of family pension as well as gratuity and other retiral benefits within three months from the date of receipt of certified copy of the order. The learned Single Judge had also granted liberty to the petitioner for revival of this petition in case of any difficulty. Since this did not materialise in favour of the petitioner, he sought permission for revival of present petition, which came to be granted. In this background the parties have now made the following submissions :-

3.1. Mr. M.D. Rana, the learned counsel for the petitioner has submitted that the petitioner was regularly appointed on the establishment of respondent no. 2 vide resolution no. 37 dated 8th December, 1965 and that appointment was made by respondent no. 2 while exercising power u/S. 108 of the Act and, therefore, he was a regular employee of respondent no.2. He has further submitted that having served respondent no. 2 for more than 20 years, he had already rendered qualifying service to become eligible to receive pensionary benefits. He has further submitted that to receive pension is a statutory right which is being conferred on an employee considering the length of service rendered to the employer and such right cannot be denied to the petitioner. He has also submitted that Gujarat Panchayat Service (Pension) Rules, 1976 and family pension scheme clearly provide for paying pension, gratuity, etc., to the employees like the petitioner and after the death of such employee to his family and respondent cannot deny such right to the petitioner. According to him, the decision not to pay pension and gratuity to the petitioner is arbitrary, high handed and violative of Articles 14 and 16 of the Constitution of India.

3.2. As against that, Mr. L.R. Pujari, Ld. AGP has submitted that since petitioner has already obtained benefit of provident fund and gratuity, he cannot now

lodge a claim for family pension. He has further submitted that in view of the fact that appointment of the petitioner with respondent no. 2 was contrary to the recruitment rules, he was not entitled to receive the pensionary benefits. According to him, all such irregular appointments were required to be cancelled in view of the direction given by respondent no. 1 vide circular dated 25th August, 1983. He has lastly submitted that even if Court comes to the conclusion that petitioner is entitled to receive family pension with all arrears, respondent no. 1 is not liable to pay the same, as it has been now well established by legal decisions of the Apex Court and this Court that to discharge such monetary liability of the Panchayat, Government is under no obligation to fulfil the same and it is the prime responsibility of the concerned Panchayat to discharge that liability.

4. Respondent no. 2 has filed affidavit-in-reply. There is also order passed by the Chief officer of respondent no. 2 after considering petitioner's case for pension in response to the direction issued by this Court in this petition vide order dated 24th October, 1997, which has been annexed by the petitioner at Annexure-A-1 to the petition wherein it has been stated that since respondent no. 2 is not converted into Nagar Panchayat from Gram Panchayat, its employees were not entitled to receive benefit of pension. Secondly it has stated that respondent no. 2 is unable to pay the pension to the petitioner from its own exchequer. The same submissions have been made by Mr. Asim J. Pandya, learned counsel for respondent no.2.

5. First of all it will have to be decided whether the petitioner is entitled to receive pension. The stand of the Government is that the petitioner's appointment on the establishment of respondent no. 2 was irregular, in view of the circular issued by the Government dated 25/8/1983 he was not entitled to receive any retiral benefit in as much as he was neither allocated employee nor Panchayat service employee. In support of this submission, it has placed reliance on Annexure-A to its affidavit-in-reply. The record of the petition clearly shows that the petitioner was appointed in the service of respondent no. 2 as Junior Clerk vide resolution passed by respondent no. 2 with effect from 9th December, 1965. The provision of section 102 of the Gujarat Panchayat Act empowers the concerned Panchayat to have servants of Panchayats who will be appointed by such authority and their conditions of service shall be such as may be prescribed. Division Bench of this Court in the case of

Satubha v/s. Moosa Raza reported in (1969) 10 G.L.R. 23 has observed as under :-

" ... There is, however, sec. 102 clause (1)(b) of the Act which provides that subject to the provisions of the Act and the rules made thereunder, a Gram Panchayat may appoint such servants as may be necessary for the discharge of its functions and duties under the Act. This power of appointing Panchayat servants is specifically vested under sec. 102 (1)(b) in the Panchayat itself. Under sec. 16 of the Bombay General Clauses Act, 1904, the power to appoint would also include power to suspend or dismiss any person appointed by it in the exercise of that power. There is, therefore, a specific provision in sec. 102(1)(b) read with sec. 16 of the Bombay General Clauses Act that it is the Gram Panchayat which alone could dismiss a servant appointed by it. In view of this express provision, sec. 47 (1) would be subject to this express power of the Panchayat to dismiss an employee. .... "

As already stated above, the petitioner joined the service in 1965 and he retired after reaching the age of superannuation vide order dated 8th October, 1986. Thus, he served the respondent Panchayat for more than 20 years. At no point of time till he retired any objection came to be raised by any of the respondents with regard to the so called irregular appointment of the petitioner. It may also be noted that circular referred to above came to be issued on 25th August, 1983 and even then nobody had found anything objectionable with regard to the appointment of the petitioner on the establishment of respondent no.2. It is only when the petitioner has tried to assert claim for retiral benefits, his disentitlement to receive the same has been pleaded on the ground of irregular appointment. It does not befit institutions like respondents nos. 1 and 2 to deny such benefits, if otherwise admissible in law, on the ground that petitioner does not deserve it on account of his back door entry into the service. One wonders how this can be a back door entry when respondent no. 2, in accordance with the provisions of section 102 of the Act, had made appointment in the year 1965, which came to be accepted as valid till the petitioner reached the age of superannuation in the year 1986. Having taken service for 21 long years from the petitioner, respondents now want to turn their faces and leave the petitioner in the

lurch. I, therefore, find that the petitioner cannot be denied this benefit on the ground that his appointment was irregular.

6. The say of the respondents and in particular respondent no. 2 is that since it has not framed rules regarding payment of pension, the petitioner is not entitled to receive the same. The State Government has framed Gujarat Panchayat Service (Pension) Rules, 1976 (for short 'the Pension Rules') in exercise of powers conferred by section 323 read with section 203 of the Act. These rules deal with payment of pension to the Panchayat servants and they have been made applicable to all the Panchayat servants except the exceptions made in rule 3 of the Pension Rules. Respondent no. 2, therefore, cannot escape its liability to pay pension to its retired servant on the ground that it has not framed any rules with regard to payment of pension. Since the Pension Rules are very much in existence, the respondent no. 2 has to make provision for payment of pension to its retired servants like the petitioner.

7. So far the family pension is concerned, widow of the deceased petitioner (who is present petitioner) would be entitled to receive the same in light of the family pension scheme introduced on 1st January, 1972 which was made effective from 1st June, 1971. The said scheme has been made applicable to the retired Government servant who has retired on or after 1st June, 1971 and who has died on or after that date. So far applicability of the provisions of the scheme to the employees of the Panchayat is concerned, this Court has on more than one occasion laid down that the widow of the deceased retired servant of the Panchayat would be entitled to receive family pension. One such decision has been given in the case of Kashiben N. Wala v/s. Balwara Nagar Panchayat reported in 1993 (2) G.L.H. 985. In view of the earlier decisions of this Court, I am inclined to hold that the present petitioner is entitled to receive family pension under the aforesaid scheme.

8. This brings me to the question as to who is liable to make payment of the pension and family pension. Is it the responsibility of respondent no. 2 alone or all the respondents are jointly and severally liable to pay the same ? This question has been discussed and decisions have been rendered by this Court in various judgments. In case of Modi Ramsingbhai Madhavbhai v/s. Bhabhar Nagar Panchayat reported in 1993 (1) G.L.H. 216 the learned Single Judge of this Court [Coram : N.J. Pandya, J. as he then was] placing reliance on the

judgment of R.K. Soni's case (supra) and State of Gujarat v/s. Ramanlal reported in (1983) 2 S.C.C. p. 33 has held that in view of the decisions stated above, the employees of a given Panchayat will become Government employees irrespective of their original position and it was therefore, directed to all the respondents to pay pension, gratuity and other retiral benefits to the petitioner of that case. It was also clarified in that case that primary obligation to pay the pension and other benefits to the retired servants shall be that of respondent no. 1 Panchayat and in case it failed to do so, it would be open for the petitioner to recover the same from the State Government. Similar view has been taken by the learned Single Judge of this Court [Coram : J.M. Panchal, J.] in decision rendered in the case of Ratilal Narsiram Purohit v/s. State of Gujarat and ors. dated 25th April, 1994 in Special Civil Application No. 1169 of 1992. In this case the learned Single Judge has taken into consideration the decision rendered in R.K. Soni's case (supra) as well as Modi Ramsingbhai's case (supra) and placing reliance thereon, has decided that the primary responsibility is that of the Panchayat, but in case it failed to discharge its liability, the retired employee can approach the State Government for receipt of pension, gratuity, etc.

However, the Division Bench of this Court while dealing with this question in contempt petition, namely Misc. Civil Application (Contempt Petition) No. 482 of 1995 in Special Civil Application No. 1205 of 1978 in its judgment dated 21st December, 1999 has held that the ratio laid down in R.K. Soni's case (supra) would apply to only the employees who are allocated municipal employees. While dealing with the submissions made therein on behalf of the retired employee to the effect that irrespective of the fact that how such employee came to be appointed on the establishment of the Panchayat, in accordance with ratio laid down in R.K. Soni's case (supra), he would be entitled to claim the benefits from the State Government also, the Division Bench has observed as under :-

> "..... The only grievance that remains was that payment was not actually made by the State Government and, on that issue, a contention was raised that it was for the State Government to actually pay the amount. This contention was sought to be fortified by the decision of the Supreme Court in State of Gujarat v. R.K. Soni (supra). In our opinion, such a contention is not a all warranted from the direction contained in

Clause (5) which is reproduced in paragraph 24 of the said judgment at page 169 of the report. It will be seen from the very first paragraph of this judgment that the Hon'ble Supreme Court was specifically considering the grievance which was raised by the ex-municipal employees who were allocated. This is clear from the following observations in the very first paragraph of the judgment :

"On the one hand, there are lakhs of employees working under various Panchayat Institutions, call them Government servants or no, to whom the benefits of the recommendations of the two pay Commissions, the Sarela and the Desai Commissions, have been extended, while on the other hand, there is a microscopic number (comparatively) of about six thousand employees of the lowest category, also working under Panchayat Institutions, who are denied the benefits of those recommendations, on the sole ground of a birthmark, if we may so call it, since they are denied the benefits because before they came to work under the Panchayat Institutions, they were employed in municipalities while the others were Government servants to start with."

In paragraph 24 of this judgment, the Hon'ble Supreme Court referred to the Gujarat Panchayat Service (Absorption, Seniority Pay and Allowances) Rules, 1965 which provided for the equation of posts, fixation of seniority, scales of pay and allowances of "allocated employees". It noted that the Rule provided that every allocated employee holding a corresponding post immediately before the appointed day, shall be appointed to the equivalent post. It was also observed that unless equivalence of posts is first determined, by order, by the Government, the said Rules could not be effectively applied. The Government however did not make any order regarding equation of posts of the staff in the local cadre and the fixation of their scale of pay although such orders were made in respect of posts of other cadres. It was observed that the State Government did not also extend to the staff

> borne on the local cadre of the panchayat service the benefit of revision of scales of pay etc. which were made on the basis of the recommendations of the two Pay Commissions though such benefit was extended to the District and Taluka cadres; nor did the Government made any order providing for promotional avenues to employees of the local cadre. It was observed that, aggrieved by the deaf ear turned to their representations, certain ex-municipal employees included in the local cadre of the Panchayat Service for themselves and on behalf of other ex-municipal employees, had filed a writ petition. It will thus be noticed that the directions in Clause (5) regarding payments were specifically given in respect of the petitioners and the persons whom they represented, as a consequence of rationalisation or revision, and the directions contained in Clauses (1) to (4), which also were given in favour of the petitioners and the persons whom they represented. The Division Bench in the petition, which was filed by Halol Nagar Panchayat, directed that the writ was to issue so that the benefits relating to equation of posts, promotions, fixation of pay scales and revision thereof on the basis of the recommendations of the Sarela and the Desai Pay Commissions were extended on the same terms in which they were issued in R.K. SONI's case (supra). Admittedly, the employees of the Halol Nagar Palika were not allocated municipal employees. They were all for the first time borne on Nagar Panchayat's service after its constitution. It will be clear from the observations which were made in paragraph 69 of the decision in R.K. SONI's case reported in AIR 1977 Guj. 76 that a note was taken of the provisions of Section 204 of the Gujarat Panchayats Act, which provided that, subject to the rules which may be made by the State Government in that behalf, it was the statutory obligation of the concerned panchayats to bear he expenditure towards pay and allowances and other benefits of all officers and servants serving for the time being under them."

In light of the latter decision by the Division Bench of this Court, there is no need to deal with other decisions cited by Mr. Rana in support of is contention that to pay the retiral benefits to the petitioner is also responsibility of respondents nos. 1 and 2, since

they are of Learned Single Judges and have been rendered prior to the judgment of the Division Bench. Thus the petitioner was not covered under the category of R.K. Soni's case (supra). In this case, therefore, it is the sole responsibility of respondent no. 2 to discharge its liability to pay the retiral benefits and the family pension to the petitioner.

Secondly, merely because Pension Rules have been made by the State Government, it cannot be saddled with the liability to discharge the burden of the Panchayats with regard to pensionary benefits to the retired servants of the Panchayats. Section 204 of the Act provides that expenditure towads pay and allowances and other benefits available to an officer or servant of Panchayat shall be met by the Panchayat from its own funds. It is, therefore, very clear that it is the iability of Panchayat to pay the retiral benefits to its retired employees.

9. In view of the aforesaid discussion, respondent no. 2 is directed to pay to the petitioner arrears of pension from the date of retirement of the deceased petitioner till the date of his death and thereafter the arrears of family pension to the present petitioner from the date of death of the deceased petitioner till the actual payment together with interest at the rate of 14% p.a. on the arrears of pension as well as family pension. Respondent no. 2 is also directed to pay family pension regularly after clearing all the arrears to the present petitioner. Respondent no. 2 is directed to work out the figure on both these counts in accordance with the provisions of law and if some amount is paid to petitioner in lieu of pension, after adjusting the same and complete this exercise within a period of three months from the date of the judgment and to clear all the arrears within that period. The petition is, therefore, partly allowed. Rule made absolute to the aforesaid extent with no order as to costs.

[AKSHAY H. MEHTA, J.]

* Pansala.